

**Overnite Transportation Company and Freight Drivers, Warehousemen and Helpers, Local Union No. 390 affiliated with The International Brotherhood of Teamsters, AFL-CIO and Johnny A. Fryer and Hugo Hernandez.** Cases 12–CA–18110, 12–CA–18596, 12–CA–18695, 12–CA–18909, 12–CA–18611, and 12–CA–18971

April 20, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN AND HURTGEN

On June 8, 1998 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions. The Respondent filed a reply and an answering brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions except as modified and to adopt the recommended Order as modified and set forth in full below.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with a copy of a complaint letter from a Home Depot store in relation to the discipline of employee Carlos Ramirez. The judge also found that the Respondent's failure to provide other information in relation to that discipline was not unlawful. The General Counsel has excepted, arguing that the Respondent also violated Section 8(a)(5) by failing to provide a complaint letter regarding Ramirez from customer Eurostyle. For the reasons stated below, we find merit in this exception.

On October 9, 1996, Ramirez was issued a corrective action report (written warning) based on a customer complaint from Eurostyle. At the disciplinary meeting involving that complaint, Assistant Terminal Manager

<sup>1</sup> We grant the Respondent's motion to take administrative notice of *NLRB v. Wehr Constructors, Inc.*, 159 F.3d 946 (6th Cir. 1998).

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely on the judge's statement in fn. 11 of his decision that the Respondent and its subcontractors would, if the issue arose, be considered joint employers. We also do not rely on his speculation in fn. 12 as to whether the Respondent's Miami hiring procedure is followed at its terminals where there is no union representation.

We correct the record to indicate that the name of the customer to whom employee Hugo Hernandez made a delivery on August 8, 1997, is "Brassline." We also correct the caption of the judge's decision to indicate that neither Mark Richard nor Judith Scott participated in the hearing as counsel for the Union, and that Marc Stefan did so participate.

Doy Argo showed Ramirez the Eurostyle complaint. After Ramirez persuaded Argo that the Eurostyle complaint may have lacked merit, the warning, if not withdrawn, was reduced to an oral warning. Ramirez was not required to sign the corrective action report. Therefore, under the Respondent's policy, it was not an official written warning.

On December 11, 1996, Ramirez was issued a "final" corrective action report as a result of a complaint from customer Home Depot. In the disciplinary meeting, Union Steward Hugo Hernandez asked Assistant Terminal Manager Argo for a copy of this corrective action report concerning Ramirez, a copy of the Home Depot letter (which had been shown to Hernandez and Ramirez), and any other material relevant to the report. Argo gave Hernandez a copy of the report but declined to give him a copy of the Home Depot letter. At a later date, Hernandez asked Argo for information regarding Ramirez. Argo said that he would provide information in response to a written request. On February 12, 1997, Ramirez made a written request, witnessed by Hernandez, for "all my personal records, write ups and any documentation relating to my job at Overnite Transportation." On February 24, 1997, Argo (now terminal manager) transmitted copies of four corrective action reports dated December 11, October 9, 1996, and February 10 and 26, 1993, plus a bill of lading dated April 30, 1996, indicating that this constituted the entire documentation that the Respondent had concerning past disciplinary actions or warnings issued to Ramirez. Argo did not transmit the Home Depot letter or the complaint letter from Eurostyle.

At the hearing, Argo was asked whether, in addition to the Home Depot incident, there were any other reasons why Ramirez was issued a final warning in December 1996. He replied, "Yes, there were—there had been a verbal warning and a discussion with Mr. Ramirez about a like incident, although it was—the visibility of this incident was not as broad as the visibility of the [Home Depot] incident." Thus, the severity of the December discipline (a final warning) was based at least in part on the October Eurostyle complaint.<sup>3</sup>

Further, the Eurostyle letter was clearly within the scope of the written request. That request, on its face, asked for "all . . . write ups and any documentation . . ." Nothing in this language excludes the Eurostyle letter. Clearly, the purpose of the information requests was to allow the Union to review the information to decide whether to grieve the December discipline further. The

<sup>3</sup> As to the Eurostyle letter, we note that, despite Argo's apparent acceptance of Ramirez' explanation of the incident, it remained the subject of a corrective action report (indeed, the Respondent included a copy of the report, but not the letter, in its response to the written request for information). Further, as discussed *supra*, Argo's testimony indicates that the Eurostyle letter played at least *some* role in the decision to discipline Ramirez.

Eurostyle letter was relevant to this legitimate purpose, and the Respondent's failure to supply it was, in these circumstances, unlawful.<sup>4</sup>

2. In the remedy section of his decision, the judge concluded that, because the Respondent's unlawful unilateral changes (i.e., subcontracting, changes to the starting time, and institution of a call-in procedure) had no material or measurable effect on the earnings of its unit employees, no backpay remedy was required. The General Counsel has excepted to this conclusion, contending that the unit employees' earnings were reduced by the Respondent's actions. Although we express no view as to the merits of the General Counsel's arguments in this respect, we note that the General Counsel did present significant evidence to support his assertions,<sup>5</sup> and we find that the General Counsel should not be precluded from advancing his arguments. Accordingly, we shall allow the General Counsel, at the compliance stage of this proceeding, to attempt to show that a backpay remedy is required.<sup>6</sup>

3. As to the subcontracting issue, we, unlike our dissenting colleague, adhere to the Board's view as articulated in *Torrington Industries*, 307 NLRB 809 (1992). In *Torrington*, the Board held that the Supreme Court, in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), had implicitly engaged in a balancing of factors before concluding that an employer had a duty to bargain over the kind of subcontracting decision at issue there. Such decisions, as the Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), agreed, do not involve a change in the scope and direction of the enterprise and thus are not core entrepreneurial decisions beyond the scope of the Act's bargaining obligation. There is, therefore, often no need to "reinvent the wheel" in subcontracting cases. Like our *Torrington* predecessors, we agree with our colleague that, in some cases, nonlabor cost reasons for subcontracting may provide a basis for concluding that a decision to subcontract is not a mandatory subject of bargaining. Unlike our colleague, however, we would follow *Torrington* by reserving such inquiries to cases where the

nonlabor cost reasons relate to a change in the scope and direction of a business and are therefore matters of core entrepreneurial concern outside the scope of bargaining. It is manifest (and undisputed) that the instant case does not involve a change in the scope and direction of the Respondent's business. In our view, that fact outweighs the factual distinctions mentioned by our colleague among the instant case, *Torrington*, and *Fibreboard*.

In particular, we reject our dissenting colleague's contention that *Torrington* is inapplicable because no current unit employees lost their jobs as a result of the subcontracting and there was therefore "no direct adverse impact" on the unit. At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit. In any event, it is not clear in this case that the Respondent's current employees did not, themselves, lose work opportunities. The Board's decision in *Acme Die Casting*, 315 NLRB 202 (1994), is instructive in this regard. In *Acme*, the Board held that the employer violated Section 8(a)(5) by not offering to bargain before it subcontracted drilling work and moved a drill used for the work to the subcontractor. The Board rejected a contention similar to that made by our dissenting colleague in this case and held that "the reasoning of *Torrington Industries* is not limited to situations in which employees are laid off or replaced." *Id.* at 202 fn. 1. The respondent had informed the union that the work was relocated because a "backlog in die casting and trimming caused parts to be completed late, resulting in insufficient time and manpower available to complete job on premises," and insisted that "no hours of work were lost by unit employees on account of this move." *Id.* at 207. The Board adopted the judge's finding that the employer moved the work because it otherwise "might" have had to pay its regular employees overtime to perform it. *Id.* at 202 fn. 1 and 209. Similarly, in this case, the Respondent's regular employee drivers "might" have lost at least the opportunity for additional work, and, as the judge stated in *Acme Die Casting*, "[t]he fact that no employees were laid off or suffered a reduction in their workweek—even if true—is irrelevant." *Id.* at 209. As we stated earlier, the General Counsel has introduced enough evidence that the Respondent's actions "might" have had a material impact on the earnings of unit employees to warrant consideration of whether the unit employees should be granted a monetary remedy at the compliance stage of this proceeding. See footnote 6, *supra*. The assignment of more hours to leased drivers than to regular employee drivers *might* have resulted in a loss of work opportuni-

<sup>4</sup> If the Respondent believed the request to be overbroad and burdensome, it should have said so. Instead, it merely made an incomplete response.

<sup>5</sup> This evidence includes, *inter alia*, copies of invoices showing that on certain days some leased drivers worked more hours than many of the Respondent's regular employee drivers.

<sup>6</sup> Having found the Respondent's subcontracting unlawful, we shall require the Respondent to rescind the subcontracts at issue. Our dissenting colleague states that he would not provide this remedy without a showing that the affected subcontractors had notice of the proceeding against the Respondent. In our view, the requirement to rescind flows logically from the finding of violation. The notice question is properly a matter between the Respondent and its subcontractors.

However, in accordance with the Respondent's exception, we shall narrow the judge's recommended Order to provide that the Respondent shall cease and desist from unilaterally changing employees' start times when based on factors other than freight volume fluctuations.

ties for employee drivers. For all these reasons, we hold that *Torrington* subcontracting is not limited to situations where it has been affirmatively shown that the employer has taken work away from current unit employees.

#### ORDER

The National Labor Relations Board orders that the Respondent, Overnite Transportation Company, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally subcontracting bargaining unit work done at its Miami, Florida facility.

(b) Unilaterally changing the starting times of its unit employees at its Miami, Florida facility when based on factors other than freight volume fluctuations.

(c) Unilaterally requiring its unit employees at its Miami, Florida facility to call in before reporting to work.

(d) Refusing to furnish to the Union information which is relevant for the purposes of bargaining about unit employee discipline.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union regarding any changes in wages, hours, or other terms and conditions of employment of unit employees.

(b) On request, furnish the Union, in a timely manner, with any information that is relevant for bargaining over unit employee disciplines.

(c) Rescind its subcontracts with Ryder Truck Rental, LEI Dedicated Services, Pro Drivers, and any other subcontractors performing driving work.

(d) Make whole its unit employees for any loss of pay or other benefits they may have suffered as a result of its unlawful conduct, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I disagree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and failing to offer to bargain about its decision to subcontract bargaining unit work. I think that there is room for doubt as to the judge's finding that the Respondent's decision to resume subcontracting, after a "hiatus" of about 18 months, amounted to a change in terms and conditions of employment. However, even assuming arguendo the correctness of that finding, I do not find that the subcontracting was unlawful.

As an initial matter, I note the judge's finding that it was not clear whether the Respondent's costs per hour were greater or less when it used contract drivers instead of its own employees. Further, Terminal Manager Doy Argo, whom the judge generally credited, testified without contradiction that his decision to use subcontractors was not based on labor cost considerations. Rather, the Respondent was trying to cope with an increase in freight volume relative to available manpower. The judge found that, because the subcontracting did not result in any change in the scope and direction of the Respondent's business, the question of whether labor costs motivated the subcontracting was not controlling. Applying *Torrington Industries*, 307 NLRB 809 (1992), the judge found that the subcontracting was unlawful.

In my view, *Torrington Industries* was wrongly decided. Where, as here, labor costs are not the reason for the subcontracting, that fact weighs heavily in the determination of whether the subcontracting is a mandatory subject of bargaining. As discussed below, that analysis leads here to the conclusion that the Respondent's subcontracting was not a mandatory subject of bargaining.<sup>1</sup>

My view flows from *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Supreme Court divided management decisions into three categories. The first category consists of management decisions, such as choice of advertising, product type and design, and financing arrangements, which "have only an

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> I define "labor costs" to include the cost of wages, hours, and working conditions, but not such broader economic factors as, for example, retail costs, inventory expenses, and utility expenses.

indirect and attenuated impact on the employment relationship.” There is no obligation to bargain over these decisions. In the second category are management decisions, such as “the order of succession of layoffs and recalls, production quotas, and work rules, which are almost exclusively ‘an aspect of the relationship between employer and employees’.” There is an obligation to bargain over these decisions. The third category consists of management decisions that have a direct impact on employment—such as the elimination of jobs—but which have as their focus only the economic profitability of the business. For these decisions, the Court held that bargaining would be required “only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.” *Id.* at 676–679.

In the instant case, the judge found that the subcontracting had no direct impact on unit employees. Thus, it may well be that the first category (only an indirect and attenuated impact on the employment relationship) applies. In such a case, it is clear that bargaining is not required. However, even if the instant case does not fall into the first category, it falls into the third category (direct impact on employment, focus limited to economic profitability). That is, in light of the heavy freight volume relative to manpower, the Respondent’s profitability turned on its ability to subcontract the work. Without subcontracting, it would have been unable to serve its customers adequately. In that circumstance, the customers would have been required to turn elsewhere.

Applying the balancing test of the third category, it is clear that the potential benefits of collective bargaining do not outweigh the burdens that such bargaining would place on the conduct of the business. Concededly, if labor costs are the basis for a decision, the benefits of collective bargaining are potentially significant. But where, as here, labor costs are not the basis for the decision, those benefits are, at most, problematic. As to the “burden” side of the balance, a requirement of collective bargaining means that a decision cannot be made and implemented until impasse (or agreement) is reached. Under current Board decisions the reaching of that point can be long, arduous, and uncertain. Until that point is reached, the Respondent would not be able to take steps that are necessary to the economic profitability of the enterprise. Even then, unilateral action would be premised on the elusive law of impasse.

Based on the above, I conclude that the benefits are problematic and that the burdens are substantial. And, in order for the decision to be a mandatory subject, the balance must go the other way. Clearly, the General Counsel has not established that the benefits of bargaining outweigh the burdens. See *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (3d Cir. 1998) (decision to subcontract based on employer’s need to meet increased demand held not bargainable); *Furniture Rentors of Amer-*

*ica, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994) (rejecting Board’s approach as set forth in *Torrington Industries*).

*Fibreboard*, *supra*, does not require a contrary result. In *Fibreboard*, the employer “merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.” 379 U.S. at 213. In the instant case, however, none of the Respondent’s unit employees was replaced or laid off. Indeed, the Respondent hired a limited number of new full-time employees after it resumed subcontracting in July 1997. Further, the judge found that the employees neither lost income nor worked fewer hours as a result of the subcontracting. In addition, and very significantly, the employer in *Fibreboard* was motivated by labor cost considerations. The employer had received assurances from subcontractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. *Id.* In the instant case, this was not the situation.

The Court in *Fibreboard* expressly limited the scope of its holding:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of “contracting out” involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of “contracting out” or “subcontracting” which arise daily in our complex economy.

*Id.* at 215. (Footnote omitted.)

As noted, in the instant case we do not confront “the type of contracting out” involved in *Fibreboard*.

As discussed above, I conclude that *Torrington* was wrongly decided. In addition, even if *Torrington* is good law, it is distinguishable. In that case, the Board limited its holding to those cases, factually similar to *Fibreboard*, in which all that is changed through the subcontracting is the identity of the employees doing the work. 307 NLRB at 811. Here, by contrast, work previously done by unit employees was not taken from them and turned over to employees of a subcontractor. To repeat, no unit employees were laid off, and they lost no wages and no hours. My colleagues state that a bargaining unit is harmed when unit work is given to nonunit employees, regardless of whether the work would otherwise have been done by employees already in the unit or by new employees who would have been hired into the unit. Assuming *arguendo* that they are correct, it does

not follow that such a work transfer is a mandatory subject of bargaining. As noted supra, the *First National Maintenance* criteria must still be satisfied.

I find the Third Circuit's analysis in *Dorsey Trailers*, supra, persuasive. The court reversed the Board and found that the employer's decision to subcontract unit work was not a mandatory subject of bargaining. *Dorsey Trailers*, like the instant case, but unlike *Fibreboard*, did not involve the replacement of one group of employees by another. Accordingly, the issue was whether the subcontracting decision centered around the scope and direction of the employer's enterprise, its future viability and whether the decision was motivated by a desire to reduce labor costs. 134 F.3d at 132–133. The court concluded that the decision to subcontract, which was based on the employer's need to meet increased demand, was not motivated by a desire to eliminate or reduce the overtime of unit employees. Thus, the decision was not a mandatory subject. Similarly, here the Respondent's decision was aimed at the increase in freight volume relative to available manpower and was not motivated by a desire to reduce labor costs. Another striking similarity between *Dorsey Trailers* and the instant case is the lack of impact on unit employees. Here, as in *Dorsey*, the subcontracting had no direct adverse impact, in any measurable way, on the existing complement of bargaining unit employees.

Finally, my colleagues say that the decision herein "might" have an impact on employees, albeit a future one. However, assuming arguendo that there was such an impact, that does not mean that the decision was a mandatory subject. Under the third category of *First National Maintenance*, a decision with an impact on employment is a mandatory subject only if the benefits for collective bargaining outweigh the burdens. That is not the situation here.<sup>2</sup>

<sup>2</sup> Because I would not find that the Respondent's subcontracting was unlawful, I would not, as my colleagues do, require the Respondent to rescind its current subcontracts. Even if the subcontracting were unlawful, I would not provide this remedy in the absence of a showing that the affected subcontractors had notice of the proceeding against the Respondent.

My only other disagreement with my colleagues relates to the Respondent's failure to furnish a copy of the Eurostyle complaint letter in connection with the disciplining of employee Carlos Ramirez. I note that the warning notice given Ramirez, on its face, refers only to the Home Depot incident. Although Argo alluded to the Eurostyle incident in his testimony concerning the warning, he clearly minimized its impact in comparison with the Home Depot incident. Moreover, although Steward Hernandez made it clear to Argo that he wanted a copy of the Home Depot letter, he did not do so as to the Eurostyle letter. I also note that, after Ramirez and Argo discussed the Eurostyle incident on October 9, 1996, Argo concluded that the complaint might not have merit and he did not require Ramirez to sign the associated corrective action report. In these circumstances, I would not find unlawful the Respondent's failure to include a copy of the Eurostyle letter in its response to Ramirez' remarkably broad-written request for information.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally subcontracting bargaining unit work.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally changing starting times based on factors other than freight volume fluctuations, call in procedures, or any other term or condition of employment of unit employees.

WE WILL NOT refuse to bargain collectively with the Union by refusing to furnish information which is relevant to the discussion of unit employee discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees regarding any changes in wages, hours, and terms and conditions of employment of unit employees.

WE WILL, on request, furnish to the Union information that is relevant to discussion of unit employee discipline.

WE WILL make whole our unit employees for any loss of pay or other benefits they may have suffered as a result of our unlawful conduct, with interest.

WE WILL rescind our subcontracts with Ryder Truck Rental, LEI Dedicated Services, Pro Drivers, and any other subcontractors performing driving work.

#### OVERNITE TRANSPORTATION COMPANY

*Jennifer Burgess-Solomon Esq.* and *Karen M. Thornton Esq.*,  
for the General Counsel.

*Craig T. Boggs Esq.* and *Daniel Pasternak, Esq.*, for the Respondent.

*Judith Scott, Esq.*, *Mark Richard Esq.*, and *Ardyth Walker Esq.*,  
for the Union.

## DECISION

## STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Miami, Florida, on December 9 to 12, 1997, and February 2 to 5, 1998. The charge in Case 12-CA-18110 was filed by Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union or Local 390) on June 7, 1996. The charge in Case 12-CA-18596 was filed by the Union on February 3, 1997, and amended on April 30 and May 16, 1997. The charge in Case 12-CA-18611 was filed by Johnny A. Fryer, an individual, on February 7, 1997, and amended on May 23, 1997. The charge in Case 12-CA-18695 was filed by the Union on March 26, 1997. The charge in Case 12-CA-18909 was filed by the Union on July 21, 1997. The charge in Case 12-CA-18971 was filed by Hugo Hernandez, an individual, on August 13, 1997.

A complaint was issued on August 30, 1997, in relation to the Case 12-CA-18810. A consolidated complaint was issued in Cases 12-CA-18810, 12-CA-18596, and 12-CA-18611 on October 15, 1997. Another consolidated complaint was issued on October 17, 1997, in Cases 12-CA-18695, 12-CA-18909, and 12-CA-18971. Subsequently, the consolidated complaints were further consolidated for hearing.

In substance the complaints make the following allegations:

1. That Overnite transportation Company (the Respondent), without first notifying or offering to bargain with the Union, unilaterally commenced in January 1996, to implement a call-in system for dock workers that required certain employees to call Respondent before reporting to work in order to determine if work was available. (The date is wrong and it is clear that the allegation refers to events which occurred in late December 1996 or early 1997.)

2. That the Respondent, in mid-May 1996, without first notifying or offering to bargain, unilaterally changed the schedules of employees in the unit.

3. That the Respondent, in late December 1996, without first notifying or offering to bargain, unilaterally implemented a rule requiring certain drivers to call in before reporting to work.

4. That the Respondent, in late December 1996, without first notifying or offering to bargain, unilaterally changed its method of assigning work to drivers by, *inter alia*, taking away regular routes and not assigning work on certain days of the week.

5. That the Respondent in early January 1997, without first notifying or offering to bargain with the Union, unilaterally implemented a "bills-per-hour standard" for the assignment of work.<sup>1</sup>

6. That on or about December 11, 1996, the Respondent by Doy Argo, threatened to discharge employees because of their union membership and activities.

7. That on or about December 11, 1996, the Respondent, for discriminatory reasons, issued a final written warning to Carlos Ramirez.

8. That on or about December 11, 1996, the Respondent failed to timely furnish to the Union information requested in connection with the warning to Ramirez.

9. That on or about February 24, 1997, the Respondent, for discriminatory reasons, issued a written warning dated October 9, 1996, to Carlos Ramirez.

10. That on or about August 11, 1997, the Respondent, for discriminatory reasons, suspended Hugo Hernandez.

11. That on or about August 14, 1997, the Respondent, for discriminatory reasons, issued a final written warning to Hernandez.

12. That since about July 8, 1997, the Respondent, without first notifying or offering to bargain, has unilaterally subcontracted out bargaining unit work.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

*A. Background*

Overnite is a national freight carrier with headquarters in Richmond, Virginia. It has over 160 facilities with about 11,000 mostly nonunion employees, whom the Teamsters Union have been attempting to organize for many years. In some cases, the Union has been successful and on August 15, 1995, Local 390, was certified, after an election held in April 1995, as the bargaining representative in the following unit of employees:

All full-time and regular part-time over-the-road drivers, city drivers, dock workers, jockeys, driver leadpersons, dock leadpersons and mechanics employed by Respondent at its Miami, Florida facility; excluding all other employees, office clerical employees, janitors, managerial employees, confidential employees, guards and supervisors as defined in the Act.

The Miami terminal is a 47-door facility and employees 37 city drivers and 18 dockworkers. Additionally, it employs three over-the-road drivers, two jockeys, and three mechanics. Non-bargaining unit employees consist of two salesmen, five clerical employees, and four supervisors. Doy Argo came to the Miami terminal in March 1996 as assistant terminal manager and thereafter became the terminal manager in January 1997, in which capacity he is in overall charge of its operations. Mark Carlson has been the inbound dock supervisor and Trey Richardson the outbound dock supervisor. Garret Wilson and James Smithers were, at times relevant to this case, dispatchers who supervised drivers.

Freight comes into and out of the facility during the course of the day. There is a group of inbound dockworkers who handle incoming freight and who start work late at night unloading freight from incoming trailers and loading freight on trailers for delivery into Miami. The inbound shift has generally commenced work at 11 p.m. and finished when the inbound freight

<sup>1</sup> In the opening statements, the Union's counsel explained that this allegation was that the Respondent put into effect, what amounted to a productivity standard for inbound dock workers requiring them to do four bills per hour. There was no evidence to support any claim that such a productivity standard was ever implemented by the Company at the Miami location. It is therefore recommended that this allegation of the complaint be dismissed.

is unloaded and then reloaded for Miami delivery. Another group of dock employees work during the morning and daytime hours and they are responsible for loading freight that has been picked up in Miami for delivery elsewhere. These are called outbound dockworkers. City drivers make deliveries and pickups within the Miami area using tractor trailers. The three over-the-road drivers move freight between the Miami terminal and terminals located elsewhere.

Deliveries into the Miami area are divided into two generalized categories. Some customers have a sufficiently large volume of shipments that freight designated for them is sometimes put into a separate area of the terminal and delivered in bulk. (This is referred to as appointment or volume freight.) Most of the other shipments are relatively small, going to a wide variety of customers and these are put on trailers which are assigned to a particular area within Miami. About 24 city drivers are regularly assigned to particular routes. The remainder, usually less senior drivers, are assigned as needed. (There is no bid system whereby drivers select particular routes. The dispatchers can and do assign routes at their discretion.)

The city drivers generally leave the terminal with a load of freight by around 9 a.m. and continue on their routes, making deliveries until completed. In this sense, although they have a set start time, they do not have regularly defined hours although Department of Transportation rules prohibit drivers from working more than 15 hours in any given day or more than 70 hours over any 8-day period. Usually, starting in the afternoon, the city drivers will receive messages from the dispatchers, via phone or radio, as to any pickups that they should make while on the route. Drivers are expected to call in during the afternoon so as to keep the dispatchers informed as to their whereabouts. Changes are made as they go along.

The freight business is somewhat seasonal in that there is a slow season that usually occurs during the months of January and February and a heavy season that occurs in autumn. This means that during the slow time of year, the number of deliveries to and from the terminal will drop and the amount of work-time available for employees will correspondingly be lower. This will be discussed further in relation to some of the allegations regarding alleged unilateral changes.

At various times in the past, the Company has used nonemployee drivers during times of the year when there has been a great deal of work. This practice apparently ceased sometime in early 1996 but was resumed around the first week of July 1997. Argo decided to utilize, starting on July 8, 1997, two to three outside companies to furnish drivers to make deliveries within Miami. Continuously since that time, the Respondent has regularly utilized anywhere from one to nine contract drivers per week to do work which essentially is the same as work done by its own drivers. The contract drivers, in almost all cases, utilize Overnite's tractors and trailers and are supervised by the same dispatchers who supervise Respondent's regular drivers. Overnite pays an amount per hour to the outside companies who hire the contract drivers and those companies pay the drivers. There is no dispute that Overnite never notified or offered to bargain with the Union regarding its decision to subcontract out this work. As discussed below, the Respondent argues that this practice is nothing new, and that it has had no impact on the work or earning opportunities of bargaining unit employees.

As noted above, the Union was certified as the bargaining representative at the Miami facility in 1995. At some point

thereafter, Hugo Hernandez became the local shop steward. And although the parties have not reached a collective-bargaining agreement, and there is no contractual grievance/arbitration procedure, Hernandez has regularly dealt with Doy Argo regarding various grievances that have arisen. Indeed, the testimony of Hernandez is that Argo has been extremely accommodating with respect to such grievances and has, in virtually all cases, reduced or retracted disciplines which Hernandez has grieved on behalf of employees. Although the evidence shows that Carlos Ramirez was the person who originally contacted the Union back in late 1994 or early 1995, it does not appear that his union activities at the terminal have been particularly distinguishable from many of the other drivers. (Argo nevertheless acknowledges that he understood that Ramirez was an active union supporter.) Hernandez has clearly been the main force for the Union at this terminal, and as far as I can see, particularly effective on behalf of employees in dealing with management regarding local problems.

I should also note that Argo, the terminal manager, is not responsible for bargaining with the Union with respect to a contract.<sup>2</sup> On occasion, he has consulted with the Company's negotiators but only to provide information. I also note that neither Argo nor anyone else at the Miami terminal can impose any formal disciplinary action against any bargaining unit employee without first clearing such action with attorneys who are charged with reviewing such actions beforehand. I do not construe such a procedure as resulting from any altruistic motives but rather from an intention to avoid, to the extent possible, expenditures in time and money on legal proceedings.<sup>3</sup>

If anything, the facts in the present case, show that at least at the Miami facility, the Company was extremely reluctant to impose disciplinary actions against bargaining unit employees, and if imposed, was very likely to cave in when confronted by Hernandez. I suspect that the reason for this posture was not altruistic, but rather resulted from a prior history of being faced with unfair labor practice charges and complaints and a willingness to bend over backward in order to avoid potential litigation.<sup>4</sup> In any event, except for a single statement which is alleged in the present case as being violative of Section 8(a)(1) of the Act (and which is not credited by me), the evidence shows that at the Miami terminal, the management has never

<sup>2</sup> Over a period of time, the Union has been certified as the bargaining agent at individual terminals each of which are considered to be separate bargaining units. Nevertheless, for convenience, Overnite and the Teamsters Union have set up a unified forum to negotiate. This has created a somewhat unusual situation something like coalition bargaining where although each unit remains separate, bargaining nevertheless is carried out at a national level.

<sup>3</sup> On July 29, 1995, the General Counsel entered into a formal settlement regarding a number of other cases pending in various Regional Offices. In addition to the standard types of remedial actions, an alternative disputes resolution procedure was established to deal with certain types of allegations. This settlement, which was mentioned at various times during the present case, is more fully described by Administrative Law Judge Benjamin Schlesinger in an opinion issued on April 10, 1998. (JD-5-98.)

<sup>4</sup> In the context of contract bargaining with a certified or recognized union, there is another compelling reason for an employer to be cautious. If the employer engages in conduct which might later be found to be an unfair labor practice, a union, if it commences a strike, can legitimately assert that the strike was caused, at least in part, by the employer's unfair labor practices. In such a situation, the employer would be unable to permanently replace strikers and would be required to recall them if they unconditionally offered to go back to work.

interrogated or threatened employees because of their union activities.

*B. Allegations Regarding Carlos Ramirez*

Carlos Ramirez is employed as a city driver. He testified that he was the person who initiated the union-organizing campaign at the facility. And although his union activities are not nearly as extensive as those of Hernandez, Doy Argo concedes that he became aware, soon after his arrival at the Miami terminal, that Ramirez was an active union supporter.

On October 9, 1996, Ramirez was called to a meeting with Argo where he was presented with a proposed corrective action report which resulted from a customer who complained about him. At the meeting, where the customer's written complaint was shown to him, Ramirez successfully argued that the complaint might not have merit and so the warning, if not withdrawn, was reduced to a verbal warning. Ramirez was not required to sign the corrective action form and as such, the matter did not, under company policy, rise to the level of an official written warning.<sup>5</sup> Contrary to the General Counsel's assertion, the evidence does not suggest that this action was motivated by Ramirez' union activities. On the contrary, it could be argued that this incident shows that at least with respect to disciplinary actions, Argo, who was aware of Ramirez' union activity, was willing to mitigate the disciplinary action if he received a reasonable explanation.

The October 1996 incident was the first warning that Ramirez had received since the election which was held on April 13, 1995. He did receive two other correction action reports, but these were in 1993, well before any union activity at this location.

The complaint alleges that the Respondent violated the Act by issuing to Ramirez, the October warning on or about February 24, 1997. I am not sure what this allegation is based on, since the complaint does not allege that the warning itself constituted a violation of the Act when it was first given to Ramirez. With respect to this allegation, the facts show that Ramirez, in relation to a different warning (dated December 11, 1996), made a written request on February 12, 1997, for information regarding his disciplinary record and that on February 24, Argo turned over a group of documents which included the October 9, 1996 corrective action report. As the October 9 corrective action report was handed over to Ramirez in response to his request, it hardly can be shown that this "issuance" was discriminatorily motivated. I therefore recommend that this allegation of the complaint be dismissed.

On December 2, 1996, Ramirez went to Home Depot to make a delivery. He parked his truck at the dock and proceeded to unload the delivery which turned out to be short. That is, although the bill said that there were 139 boxes, there were only 81 boxes on the trailer. According to Ramirez, the Home Depot dockworker asserted that the delivery was 60 boxes short whereas Ramirez asserted that it was 58 boxes short. In any event, Ramirez states that after awhile, and while this issue was unresolved, another Home Depot employee told him that he would have to move his truck away from the dock so as to allow other deliveries to be made. Ramirez concedes that he refused repeated requests to move his truck by Home Depot personnel. At this point, according to Ramirez, the re-

ceiving manager called Respondent's dispatcher, Jimmy Smithers, who thereupon asked Ramirez to explain the problem which he did. The credible evidence is that Smithers at this point told Ramirez to move the trailer but Ramirez still persisted in staying put. The store manager thereupon called Argo who called Ramirez and told him to move the truck. Finally, Ramirez moved the truck, the bill of lading was signed as being 58 boxes short, and Ramirez eventually made his way back to the terminal.

Doy Argo testified that he received a phone call from Home Depot to the effect that Ramirez was refusing to move his truck from the dock. Argo states that he spoke to Ramirez over the phone, told him to move the truck and that Ramirez agreed to do so. According to Argo, he got a call later in the day from a woman from Home Depot who was really upset about the incident and wanted to know what he intended to do about it. Argo states that he told her that if she was that upset, she could send a letter. Argo testified that after this call he asked Smithers about the incident and Smithers told him that he received a call from Home Depot and that he had asked Ramirez to move the truck from the dock.

On December 3, 1996, Rita Essex, an employee from Home Depot wrote a letter to Doy Argo which stated:

Per our phone conversation . . . concerning The Home Depot store 206. The receiving manager, Mr. Joe Rodriguez asked your driver Mr. Carlos Ramirez to move his truck from the back door while he was processing the paper work which had a discrepancy, he refused. Joe in turn called the store mgr. Mr. Frank Martinez he also requested Carlos remove his truck so another truck could be serviced. But again Carlos refused!!! As a last resort Joe called you and you directed your driver to move the truck and he did not. We have all been quite unproductive due to the uncooperation of your driver. May I suggest strongly you do not allow this driver to service any of The Home Depot stores

Realizing that Home Depot, a fairly sizable customer, was serious enough about the incident to write this letter, and this incident occurring just about 2 months after the previous customer complaint about Ramirez, Argo decided to issue a formal warning to him. (After clearing it with the company's attorneys.)

On December 11, 1996, Argo called Ramirez and Hernandez into his office in order to present Ramirez with a corrective action report indicating that it was a "final" warning. At this meeting, Argo explained why he was issuing the discipline asserting among other things, that Ramirez had failed to respond to Home Depot's instructions to move the truck and Smithers' directive to do so. Ramirez told Argo that he did not work for Home Depot and that his only bosses were Argo and Smithers. (I suppose Ramirez was saying that he did not have to listen to Home Depot's people.) Ramirez claims that after trying to explain the dispute about the number of boxes that were short, Argo said that if he continued with his union attitude he would be fired. Ramirez states that he and Hernandez went outside to talk and where they decided to call the Union. Ramirez testified that when they returned to the office, Argo refused to talk to the union official. Ramirez also testified that when they returned to the office, he told Argo that Smithers had not told him to remove the truck from the dock but that when Smithers was called into the discussion, Smithers said that he did. Ramirez claims that during this meeting, Argo did not

<sup>5</sup> If the Company is intent on giving a written warning, the employee is required, as a condition of continued employment, to sign the corrective action report.

show either the letter from Home Depot to either himself or Hernandez.

The corrective action report form has a place at the bottom of the page, for an employee to write his response to a discipline. As Ramirez had difficulty writing in English, he told Hernandez his version of the events and Hernandez wrote it down, filling out the front and the back of the page. He states that Hernandez wrote down, *at the top of the page*, the alleged threat.

Hernandez testified that at the December 11, 1996 meeting, Argo showed them both the proposed corrective action report and the letter from Home Depot. Hernandez states that he caucused with Ramirez to get his version of the events and that after they returned, Ramirez tried to explain his side of the story. According to Hernandez, after returning from his caucus with Ramirez, Argo said, "I[If] you keep this union attitude, I'm going to have to terminate you." Hernandez states that he wrote this down at the top of the corrective action report form and continued to write, at the bottom of the page and the other side, Ramirez' version of the events. He states that at one point during the meeting, Ramirez asked to have Smithers called in but that Smithers took the Company's side.

Argo categorically denied that he made any threat to discharge Ramirez if he continued to have a union attitude. Regarding, the writing at the top of the corrective action report form, Argo testified that Hernandez initially wrote out Ramirez' response in the appropriate place starting at the bottom of the page, and only wrote what appears on the top of the page after Hernandez and Ramirez initially left the office and after they returned following their call to the Union.

Smithers testified that he was called into the meeting at some point, but really could not recall what if anything he said. (He does recall that after Hernandez and Ramirez left, he asked to see what Hernandez had written and told Argo that it was bull.) Smithers was not present at the entire meeting and he could neither confirm nor deny the alleged threat made by Argo to Ramirez. He confirms Argo's assertion that Hernandez wrote down the alleged threat on the top of the page after returning some time after having completed Ramirez' version of the events on the bottom and back of the form.

Anything is possible. But the evidence in this case indicates that during his entire tenure at the Miami terminal, Doy Argo has never made any kind of threat or statement even remotely similar to the one attributed to him by Hernandez and Ramirez on December 11, 1996. Further, Argo had consulted with counsel before presenting the corrective action report to Ramirez. Argo did not strike me as being stupid and although smart people sometimes do stupid things, I don't think it likely that Argo would make a statement clearly indicating antiunion animus during a disciplinary meeting directly in front of the Union's shop steward. In my opinion, Hernandez and Ramirez, realizing that the discipline was clearly warranted, fabricated the threat in order to make out a case of antiunion retaliation. (Hernandez was quite familiar with unfair labor practice procedures and no doubt had a good idea of what evidence was desirable in an NLRB proceeding.)

In my opinion, the actions of Ramirez at Home Depot showed a disregard of customer needs and his refusal to follow Smithers' order to move the truck, constituted insubordination. The written warning, even if a final warning, does not strike me as being disproportionate to the offense and the evidence does not indicate to me that the discipline was at variance with other

discipline taken vis a vis other employees at the Miami terminal. In short, as I do not credit the alleged threat made by Argo, and conclude on objective grounds that the level of discipline was justified, I recommend that this allegation of the complaint be dismissed.

In connection with the Ramirez discipline, the General Counsel also alleges that the Respondent violated Section 8(a)(5) when it failed to timely furnish certain requested information to the Union.

According to Hernandez, at some point during the December 11 1996 meeting, he asked Argo for a copy of the corrective action report, a copy of the Home Depot letter, and anything else that was relevant to Ramirez' writeup. Argo made and gave him a copy of the report, but declined to give Hernandez a copy of the Home Depot letter on the asserted grounds that the letter was confidential. Thus, although the letter had been shown to Ramirez and Hernandez during the course of the meeting, a copy was not turned over to them. No other written information was given and the credible evidence does not show that Hernandez, at that time or at any time soon thereafter, made an explicit request for any other documentation.

Hernandez testified that at some subsequent time, he asked Argo for information regarding Ramirez and that Argo said that he would provide information if the request was made in writing. Accordingly, on February 12, 1997, Ramirez made a written request for "all my personal records, write ups and any documentation relating to my job at Overnite transportation." The document indicates that it was witnessed by Hernandez. Argo received this document on February 12 and 24, 1997, he transmitted copies of four corrective action reports dated December 11 and October 9, 1996, February 10, and 26, 1993, and one B/L dated April 30, 1996; these being the entire documentation that the Company had regarding past disciplinary actions or warnings issued to Ramirez during his employment. Argo did *not* furnish the Home Depot letter which precipitated the December 11, 1996 corrective action report. He refused to furnish this document on the grounds that he felt it was confidential.

In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that the employer was obligated to furnish information in relation to both pending and potential grievances, so as to enable the union to assess the merits of a grievance. Accordingly, information which would tend to disprove the validity of a grievance would be just as relevant as information which would tend to establish the merits of a grievance. The Court stated:

When the respondent furnishes the requested information, it may appear that no subcontracting or work transfer has occurred, and accordingly, that the grievances filed are without merit.

Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitration process. Arbitration can function properly only if the grievance procedures leading to it can sift out nonmeritorious claims. For if all claims originated as grievances had to be processed through to arbitration, the system would be woefully overburdened.

In *Ohio Power Co.*, 216 NLRB 987, 991 (1975), the Board formulated a test for evaluating the relevance of broad categories of requested information as follows:

Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required; but where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting of work performable by employees within the appropriate unit) and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus, where the information is plainly irrelevant to any dispute there is no duty to provide it.

....

It is not required that there be grievances or that the information be such as would clearly dispose of them. The union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter.

Further, where relevant information is requested, the employer (or union), is required to furnish it in a timely fashion. *Civil Service Employees Assn.*, 311 NLRB 6, 9 (1993).

The names and addresses of witnesses to an incident for which an employee receives discipline is relevant in relation to a union's right to present a grievance. *Bovertown Packaging Corp.*, 303 NLRB 441, 444 (1991).<sup>6</sup> On the other hand, the Board has also held that a refusal to provide pre-arbitration disclosures of witness statements does not violate the Act because of confidentiality considerations. *Anheuser-Busch, Inc.* 237 NLRB 982 (1978).

Weighing relevance to legitimate considerations of confidentiality is not always so easy. In *Pennsylvania Power Co.*, 301 NLRB 1104, 1107 (1991), the Board held that the employer did not violate Section 8(a)(5) of the Act by refusing to furnish the names, addresses, and statements of informants whose statements were used as the basis for testing employees for drug abuse. On the other hand, the Board did find that the employer violated the Act by refusing to provide a summary of the informant's statements. The Board stated:

Although we agree that the names and addresses of informants here are relevant to the Union's collective-bargaining responsibilities, we find that in investigations of this kind of criminal activity, a potential for harassment of informants, with a concomitant chilling effect on future informants, is sufficiently likely that the Respondent has a legitimate interest in keeping the informants' identities confidential and that this confidentiality interest outweighs the Union's need for the informant's names and addresses.

....

We agree with the judge that the Respondent did not violate Section 8(a)(5) . . . by refusing to supply the informants' statements, and we adhere to our holding in *Anheuser-Busch*, supra. Balancing the competing interests, however, we find, contrary to the judge, that the Respondent is required to supply the Union with a summary of the informants' statements. This summary should be drafted to include the information on

<sup>6</sup> However, in certain circumstances, the employer may refuse to give out unlisted phone numbers. *GTE California, Inc.*, 324 NLRB 424 (1997).

which the Respondent relied to meet the threshold "suspicion" standard for performing the drug tests.

In my opinion, the facts in the present case do not present the kinds of confidentiality issues presented in *Pennsylvania Power Co.*, supra, or *Anheuser-Busch*, supra. The Home Depot letter was a customer complaint and not a witness or informant statement obtained by the respondent for use in operating an antidrug program or in an arbitration or other legal proceeding. (In fact there was no possibility of the writer being called to testify in an arbitration case as there is no contract between the Union and the Respondent containing an arbitration clause.) The Home Depot letter writer neither sought nor was offered confidentiality. Finally, the Respondent can hardly press a claim of confidentiality when Argo asserts that he showed the letter to Hernandez and Ramirez on December 11, 1997.

While the Union had no means to compel the company to arbitrate the Ramirez warning, this does not mean that it could not have used the Home Depot letter to evaluate whether its representatives wanted to spend the time to bargain over this grievance within the context of local contract negotiations. Moreover, although perhaps unlikely to change the company representative's mind, the review of relevant information always provides some hope. The fact that the request for the letter was made orally by the shop steward in the first place, and thereafter in writing by an employee is not, in my view, grounds for any defense. It was not proved that there was any agreement between the Company and the Union that required information requests to be made in writing. An oral request is sufficient.

I do not conclude, however, that the Respondent violated the Act by failing to provide the other information. The evidence shows that at the December 11, 1996 meeting, Hernandez asked for and received a copy of the Ramirez' corrective action report. He asked for but was refused the Home Depot letter. When Argo gave Hernandez a copy of the report, he did not hear from him for a period of time, and with the exception of the Home Depot letter, was entitled to think that he had complied with Hernandez' request for relevant information. When, Hernandez finally got around to repeating his request for "relevant" information and had Ramirez make the request in writing, Argo furnished the information contained in Ramirez' personal file within 12 days. Thus, when faced with an explicit request for information, Argo responded and with the exception of the Home Depot letter acted with reasonable dispatch in tendering the relevant documentation.

### C. Allegations Regarding Hugo Hernandez

Hernandez was involved in an incident on August 8, 1997, which resulted in Argo giving him a 3-day suspension and final warning. Argo states that it is true that he treated Hernandez differently than other employees because of his position as union steward. He testified that but for the fact that Hernandez was the shop steward, he would have fired him.

Hernandez was employed at the Miami facility from 1986 to 1997. (He left to become a union organizer.) At the time of the incident herein, Hernandez was employed as a city pickup and delivery driver and was the Union's shop steward at the facility.

In October 1995, 2 months after the election, Hernandez was discharged but thereafter reinstated after an unfair labor practice charge was filed and a non-Board settlement agreement reached. I did not want to litigate the circumstances of this prior discharge and I make no findings as to whether it was

motivated by antiunion considerations or for just cause. Also, over the next 2 years, Hernandez received various other warnings. Other than the fact that documentation of these warnings were received in evidence, neither party litigated the circumstances giving rise to the warnings and none of these, except for the one issued on August 13, 1997, was alleged in the complaint to be unlawful.

As noted above, Doy Argo was aware that Hernandez was the shop steward and most active person in support of the Union. This is not in dispute and the evidence, shows that Hernandez has been particularly successful in getting Argo to eliminate or mitigate disciplines to employees when Hernandez has pressed a grievance on behalf of the affected employee. In this respect, the evidence shows that in dealing with Hernandez, Argo has generally bent over backwards to accommodate him.

There is no credible evidence to show that Argo made any statements that could be construed as violating Section 8(a)(1) of the Act by way of threats, promises, interrogation, etc.

On the morning of Friday, August 8, 1997, Hernandez left the facility at 9:12 a.m. with a truckload of deliveries, one of which consisted of athletic tape for delivery to the University of Miami. According to the manifest and the testimony of Hernandez, this shipment was located in the nose of the trailer which means that it would be relatively inaccessible until other deliveries were made from the back or tail of the trailer.

Hernandez claims that he tried to make the delivery to the University at around 1 p.m., but that there was no one there to receive the freight and he therefore continued his route. He states that after making a delivery to a company called Brasswell, he left at 5 p.m. and went to make a pickup at a residence pursuant to a call he received from Smithers sometime before he arrived at Brasswell (4:47 p.m.). Hernandez claims that on his way to the residence, he got caught in a massive traffic jam for between one half to 1 hour because a tanker blew up on Route 836. He states that he made the pickup and decided, notwithstanding instructions from dispatcher Smithers, to go back to the terminal without making the last two deliveries because he was too tired, having stayed up the previous night with his sick daughter. He claims that he told Smithers that he was too tired and would endanger the public if he had to drive to the University of Miami.

Hernandez' trip card, which was written out by Hernandez, shows that he arrived at Brasswell at 4:47 p.m. and completed his delivery there at 5 p.m. The trip card shows that Hernandez arrived at the residence for the pickup at 5:33 p.m.<sup>7</sup> The mileage between the two locations was 4 miles although Hernandez asserted in his direct testimony that it was between 8 and 10 miles. Hernandez claims that the residence was closer to Brasswell than the University of Miami, but maps introduced into evidence, show that this is not true. Hernandez conceded that before he arrived at the pickup, he received a call on the radio from Smithers who told him that the people from the University of Miami needed their delivery and that he told Smithers that he was going to make the pickup instead. Hernandez also concedes that he did not intend to make the delivery. According to Hernandez, this radio call from Smithers took place before he arrived at the residence, and looking at the map and Hernandez' description of his route to the residence, he could have avoided any further traffic by getting off the road

and heading south toward the University and away from Route 836 where the explosion had occurred. Hernandez, during cross-examination, was evasive as to whether he told Smithers before 5:30 p.m. that he was tired. And if he was getting tired, it would have made a lot more sense to make the delivery to the University and try to get someone else to make the pickup.

According to Hernandez, upon arriving at the residence, and before starting to move the freight, which consisted of over a hundred pieces, he called Smithers who again told him that it was important to make the delivery to the University of Miami because they needed the delivery for a football game on Saturday. Hernandez claims, but I don't believe, that Smithers told him to make both the pickup and the delivery.

In any event, the evidence, based on Hernandez' own testimony, shows that instead of making the delivery to the University in accordance with the explicit instructions of Smithers, Hernandez decided to disregard those instructions and go to the residence where the pickup took more than an hour to put in the trailer. Instead of then going to the University, Hernandez returned with the tape undelivered and arrived back at the terminal at 7:17 p.m. After finishing the pickup and before returning to the terminal, Hernandez states that Smithers again told him to make the delivery and that he told Smithers that he was too tired. According to Hernandez, Smithers said, "[W]ell you do what you got to do, but you'll suffer the consequences."

Saturday and Sunday were days off and Hernandez was told on Monday morning that he was suspended pending further investigation. On August 13, he received the 3-day suspension and final warning, which is memorialized in a corrective action report form.

Smithers testified that he received a call from a corporate customer service person located in Richmond, Virginia, at about 4 or 4:30 p.m. and was asked why a shipment to the University of Miami hadn't been received yet. Smithers states that this person (whom he believed was a woman), wanted to know about the possibility of getting the shipment delivered and he told her that he would have to contact the driver to find out what was going on. According to Smithers, he then determined that the driver was Hernandez and he states that at a little before 5 p.m., Hernandez called at which time, according to Hernandez' trip card, he would have been at Brasswell. Smithers states that Hernandez asked for the address of a pickup that he had received earlier in the day, at which point Smithers asked Hernandez if he had made the delivery to University. Hernandez' response was that it was buried in the nose. According to Smithers, he told Hernandez that had to make the delivery to the University because they needed it for a game on Saturday and not to worry about the pickup; that he would make other arrangements for the pickup. Smithers testified that at no time during this call did Hernandez say that he was tired or impaired. According to Smithers, he then called the people for the pickup and told them that the Company would make the pickup on Monday morning. Smithers states that he assumed that everything was settled and that he went on with other business.

Smithers testified that at about 5:30 p.m., Hernandez called from the residence and asked how the pickup was going to be paid. Smithers states that after telling Hernandez to send it as C.O.D. he asked Hernandez if he had made the delivery and was told no. According to Smithers, he said that the stuff was needed tomorrow and had to be delivered. It was at this point, according to Smithers, that Hernandez, for the first time

<sup>7</sup> In a pretrial affidavit, Hernandez asserted that it took a couple of hours to get from Brasswell to the pickup.

claimed that he was tired, albeit that he did not say that his ability or alertness was so impaired that it would be unsafe to drive. Smithers states that when he asked Hernandez to make the delivery, Hernandez talked about his daughter being up the night before. At this point, according to Smithers, he saw no point in continuing the conversation and he hung up.

According to Smithers, a little later, at about 5:40 or 5:45 p.m., someone from corporate service called and wanted to know when he was making the delivery to the University. He said that he would have to wait to see what was going to happen, inasmuch as he wasn't sure if Hernandez was going to make the delivery or return to the terminal. Either way, Smithers had to hear from Hernandez again because the tape was in the truck and could not be delivered until after Hernandez returned with the truck. Smithers states that the woman from corporate did not like his answer and wanted to know specifically what was going to happen. He states that he told her that he could not give her an answer right then, whereupon she said that she was going to talk to her supervisor. According to Smithers, a couple of minutes later, a supervisor named Ginny called him and wanted to know what was going on and why he could not give an answer about the delivery. He states that she asked if he could call the driver and that he spoke to Hernandez on the radio while she remained on the phone. At that time, according to Smithers, he asked Hernandez if he was on the way to make the delivery and Hernandez replied that he was tired. Smithers testified that when he returned to talk to Ginny, she was yelling at him and told him that the driver should be fired. He states he tried to calm her down but she kept on insisting that the delivery had to be made that evening.

Smithers testified that he then spoke to the outbound supervisor about getting one of the dock people to deliver the shipment, but as it turned out, the person who was still there did not have the proper license and couldn't make the delivery that Friday evening. According to Smithers, before leaving for home, he wrote out a corrective action report regarding the incident. He states that when he got home, he called Argo and told him what happened and Argo told him to be careful of what he said and to be clear as to how he remembered it. Later in the evening, Smithers arranged for Trey Richardson, another supervisor, to come in on Saturday morning to make the delivery. According to Smithers, at some point, probably on Monday, Argo asked him to write up a report which he did. That terminated Smithers' involvement in the matter, and in accordance with company policy, the ball was in Argo's park to make a decision.

Doy Argo testified that he first became aware of the Hernandez situation on the evening of August 8, 1997, when Smithers called him at home. He states that Smithers told him what had happened and recommended that Hernandez be fired. Argo asked Smithers if anyone else had been fired for a similar situation and Smithers mentioned two people, Perez and Faulkner, one of whom had been fired about 8 years before and the other about 2 or 3 years before. According to Argo, he called counsel in order to get advice.

According to Argo, he went in on Saturday and pulled some documents relating to the incident such as the trip card, Hernandez' timecard, the PCON, and DCON. (The DCON is the freight manifest showing the deliveries on the trailer when it leaves in the morning. The PCON is a document showing what is on the truck when it returns at night.) Argo states that on Sunday, he again called counsel and thereupon decided to sus-

pend Hernandez on Monday morning pending further investigation.

Argo testified that on Monday, he told Hernandez that he was being suspended pending investigation. He also received an e-mail from Ginny Helfenstein, the customer service supervisor who described her perspective of the events on August 8, 1997. She confirmed that she told Smithers about the necessity of making the delivery to the University of Miami. On either Monday or Tuesday, Argo received from Smithers the latter's original draft of the corrective action report written on Friday and a detailed typewritten account that Smithers did thereafter. Based on all of the above, and in conjunction with advice from counsel, Argo decided not to fire Hernandez, but rather to give him a final warning and a 3-day suspension. On Wednesday, Argo handed the corrective action report to Hernandez. This report was actually drafted by a company attorney at the Argo's request.

There is no question in my mind, but that the disciplinary action meted out to Hernandez was justified and was not inconsistent with any past company policy or practice. Hernandez clearly and willfully chose to disregard instructions, apparently believing that he could make his own rules and do his job in the way that he pleased. Rather than make a delivery as required, he chose to do something else despite repeated demands by his supervisor that he do his job. To the extent that Hernandez' union activity had anything to do with the level of his discipline, it is my opinion that Argo mitigated what he might otherwise have done if Hernandez had not been the shop steward.

#### *D. Alleged Unilateral Changes*

##### 1. May 1996 change in start times

Before May 1996, the inbound dockworkers, with some exceptions, generally started their work day at 11 p.m. from Monday through Thursday, and worked until the inbound freight was stripped and loaded onto the trailers. On Sundays, the normal start time is 10 p.m. and for at least one dockworker, Eugene Lewis, who worked in the appointment warehouse (dealing with appointment freight), the start time was an hour earlier than the other inbound dockworkers. With respect to freight delivery, the Miami terminal was responsible for delivering any freight that came into the terminal by 8 a.m., but was not responsible for same day delivery of freight that arrived after that time. Normally, the city drivers leave the terminal at about 9 a.m. and the normal closing time for the inbound freight dockworkers was at or around 8 a.m.

The fact that the normal Monday through Thursday start time for almost all of the inbound dockworkers was at 11 p.m., does not mean that there were never any variations. In fact, the Company produced timecards for a number of less senior dockworkers tending to show that there were occasions from December 1995 to March 1996 when they were scheduled to start work earlier or later than 11 p.m.<sup>8</sup> When in the past, start times of junior dockworkers were changed, the reason typically was because freight volume was either higher or lower than usual.

In April or May 1996, the Company made a change pursuant to which the terminal was required to make same day delivery on any freight that came into the terminal by 10a.m., rather than

<sup>8</sup> R. Exhs. 25(a) to (f) are timecards for Ney Areas, Ponciana Diaz Jr., Lemmie Faulk, Carlos Fernandez, Eugene Lewis, and Tomas Hernandez.

by 8 a.m. As a consequence, Argo told the dockworkers that as of May, the four least senior inbound workers would have their start times changed from 11 p.m. to 1 a.m. The purpose of this change was to have these people available later in the morning to handle any late arriving freight.

It is conceded that the Respondent did not notify the Union or offer to bargain about this change. The change, which affected 4 of the approximately 10 or 11 inbound dockworkers, did not alter, in any significant way, the weekly hours that each worked, although it is possible that it might have tended to equalize the number of hours per week between the more senior and less senior employees. (If freight volume is slow on any given day, the junior workers are sent home early unless the more senior employees volunteer to go home.) In any event, the change lasted for about 2 weeks, after which it was abandoned and the dockworkers went back to their old starting times. In this regard, Argo testified that the experiment failed, primarily because of the resistance among both the senior and less senior dockworkers.

The Respondent argues that the change was not sufficiently material to warrant bargaining and was, in any event, not really a change at all, inasmuch as the Company, had a past practice, or operational reasons for changing the starting times of this category of employee.

#### 2. Changes during the slow season—December 1996/January 1997

The amount of inbound freight coming into the Miami terminal tends to follow a yearly pattern and the latter part of December and the month of January are typically slow periods. As shown by Respondent's Exhibit 50, which is a summary of inbound freight bills per week during the period from January 1, 1995, through October 31, 1997, the most severe downturn occurred in the latter part of December 1996 and through January 1997. This downturn significantly exceeded the downturns in the two preceding years; 1994–1995 and 1995–1996. In 1997, the volume of inbound freight bounced back to more normal levels in or about the 2d and 3d weeks of February and was back to normal by March 1997.

The efficient functioning of a freight delivery service is to use the least number of trucks and employees to move the most amount of freight on any given day. It is less efficient, for example, to send out 20 trucks and drivers to make deliveries for a few hours than to send out 15 trucks and drivers to make the same number of deliveries over the course of a full day. By the same token, there is a limit, inasmuch as businesses are generally open during the daytime hours and it would be futile to have a smaller number of drivers attempting to make deliveries when stores or businesses are closed. The other limit is the size of the trailer which can only hold so much stuff. For dockworkers, the same principles apply and it is more efficient to have a fewer number of dockworkers to handle the anticipated inbound freight for the entire normal shift, than to have a larger number of people at work and standing around doing less work per employee.

With respect to both dockworkers and drivers, the evidence shows that during slow periods, the past practice is to first ask for volunteers to go home and if insufficient volunteers are found, to send home the least senior employees. In the past, an employee might be sent home either during the shift or at the beginning of the shift. In the latter case, a dockworker or driver would not be allowed to work that day, and would probably use an accrued vacation day in order to be paid.

There is no dispute about the fact that during the 1996–1997 slow period, the Company unilaterally instituted a call-in system for both the inbound dockworkers and the city drivers. It is conceded that this was done without notification to the Union and without giving the Union an opportunity to bargain. The call-in system required both sets of employees to call in before reporting to work in order to see if there was sufficient work to allow them to report. The determination as to whether low seniority employees would be told to stay home, was based on counting the number of bills that were expected to arrive at the terminal that evening and it appears that supervision used a formula to correlate the number of bills to the number of needed employees.

Contrary to the Respondent's assertion, this change in procedure was a change in its past practice. Thus, the evidence indicates that in past slow periods, when the number of bills were low, employees reported to work and if work was insufficient, the supervisors would ask for volunteers to go home, and then if not enough people volunteered, would send home the least senior dockworkers or drivers. Under the old system, a less senior worker, if he reported to work on a slow day, at least had a chance that one of the more senior employees might volunteer to go home and therefore allow him to get a day's pay that he otherwise might have lost. (Or to forgo using a vacation day that he could later use at his own discretion.)

In isolation, the call-in system, which lasted for a short time and affected only a few of the less senior workers, would amount to a relatively minor change. Nevertheless, it is my opinion that it was a change in employee hours and working conditions.

The allegation that the Company changed its assignment procedure by utilizing a new counting method, is not correct. The determination of how much work will be available to dockworkers and drivers on any given day, has always been dependent on the number of bills that are expected in the terminal for that day. For convenience sake, the Company has always counted the number of bills, assuming that this had a high correlation to the amount of freight that would arrive. Counting bills is nothing new and there is no credible evidence that the Company initiated any new standards or practice in counting freight bills to determine how to allocate its resources in terms of manpower.

Similarly, the credible evidence does not establish that there were any other significant changes in company practice during the 1996–1997 slow period. In this regard, although there was evidence that one city driver (Fryer) was reassigned for a short period from a city route to appointment freight, the proximate cause of this reassignment was the operation of the seniority system. Inasmuch as assignments have always been governed by seniority,<sup>9</sup> Fryer, who because he had less seniority, was temporarily reassigned to appointment deliveries because he had less seniority than someone else. (In effect, he was bumped from his normal route because of his lower seniority standing.) Notwithstanding this reassignment, it is virtually impossible to determine from Fryer's testimony or from company records, whether or not he worked any fewer hours during this slow period than what he would have worked under the old pre-call

<sup>9</sup> The more senior drivers have typically been assigned to specific routes and the least senior drivers have typically been assigned to do appointment deliveries. It should be noted, however, that the Company does not have any type of bid system for routes and the Company has always reserved to itself the right to change routes as it deems fit.

in system or had his assignment not been changed. It should also be noted that this reassignment hardly affected his employment in any other respect. He still reported to work at the same time, still drove a truck to make deliveries and still returned to the terminal when his deliveries were made.

### 3. Subcontracting

The Company employs, at any given time, a core group of about 34 to 37 full-time drivers who make deliveries and pickups in the Miami area.

The amount of driving work can fluctuate by season and this will affect the number of hours worked by the drivers and their corresponding income. In slow times, the amount of driving work must be allocated to the existing group of drivers, and the more senior of them are more likely to earn more money.

There are also periods when the amount of freight increases and historically, the Company, at the Miami terminal, has utilized outside companies to furnish lease drivers to move the freight. (Most typically, lease drivers will be assigned to move appointment freight and not be assigned to regular city routes.) The evidence shows that since at least 1985, the Company has maintained such a practice and has utilized such drivers along side its regularly employed drivers.

The practice of subcontracting ceased at the start of 1996 and did not resume for at least 1-1/2 years. It was suggested by Hernandez that the reason that the Company terminated this practice was because the Union threatened to file an unfair labor practice charge regarding the use of subcontracting. This may or may not be the case.

It is stipulated that in early July 1997, Doy Argo decided to reinstitute the policy of using subcontractors. The Company initially entered into relationships with Ryder Leasing Services and LEI Dedicated Services. Somewhat later, in September 1997, the Company started to use ProDrivers. In all cases, Overnite paid each company a fee based on an hourly rate and the subcontractors paid the drivers. In the case of LEI, the rate was \$16.50 per hour and in the case of ProDrivers, the rate was \$17.50 per hour plus time and a half for overtime.

The evidence shows that since July 8, 1997, the Company has continually used leased drivers at all times to the present and has used anywhere from one to nine drivers per week on a steady and regular basis. In light of the 1-1/2-year hiatus, the decision to again use subcontractors should be considered as a change in the status quo as it existed as of July 1997. The employer concedes that it did not notify the Union about the decision to use subcontractors and did not offer to bargain about that decision.

The fees paid to the subcontractors were somewhat higher than the hourly rate paid to Overnite's regular drivers. However, although Overnite's drivers typically got paid at the rate of \$15.05 per hour as of October 1997,<sup>10</sup> they also received medical and dental insurance benefits plus vacation and holiday pay. Additionally, Overnite's drivers can participate in a 401(k) plan whereby the Company puts in 50 cents for every dollar contributed by an employee. It is not all that clear whether Overnite's cost per hour is greater or less when it uses contract drivers instead of its own regular employees.

<sup>10</sup> Starting pay at this time was \$13 per hour and this went to \$15.05 after 1 year. Drivers are paid at the straight time rate no matter how many hours per week they work. This apparently is an exception to the Fair Labor Standards Act's overtime pay requirement.

According to Argo, the decision to utilize subcontractors to provide drivers was predicated on the facts that coupled with a high degree of absenteeism, the amount of freight coming into the terminal had risen to a level that was overwhelming his ability to deliver freight using his regular drivers. Argo testified that he reluctantly made this decision because, in his opinion, the use of contract drivers is not a good idea inasmuch as these people are not trained in Overnite's operations (particularly paperwork), and are not as subject to Overnite's control as his regular drivers.<sup>11</sup> In any event, Argo testified that his decision to utilize subcontractors was not based on labor cost considerations. And the General Counsels do not allege, nor have they produced any evidence which could justify a conclusion that the Respondent was motivated by antiunion considerations in making and implementing its decision to subcontract out bargaining unit work.

Although Argo, in July 1997, told the regular drivers that he would cease using subcontractors when he hired more drivers, this did not come to pass. And although Argo has hired a few new drivers, and in one case obtained a transferred driver from another terminal, he testified that it has not been very easy to get new drivers, given the licensing requirements plus Overnite's own requirements for hiring new drivers.<sup>12</sup>

The use of subcontracting, which recommenced on July 8, 1997, did not result in the layoff of any drivers at the Miami terminal. Nor did the use of subcontractors result in a diminution of the average number of hours worked by the regular drivers. The record shows that in 1997, the Company started the year with 36 drivers and that during the first quarter, there were either 36 to 37 drivers who worked, on average, 40.88 per week. During the second quarter of 1997, the Company started out with 36 drivers and ended the quarter with 34 drivers. During that quarter, the drivers worked, on average, 43.97 hours per week. During the third quarter of the year, starting with the week ending July 5, 1997, there were 33 drivers and the number of drivers directly employed by Overnite during this quarter ranged between 32 and 34. The average hours worked per driver during this quarter (which is when the subcontracting started), was 45 hours per week. During the fourth quarter, the Company started out the quarter with 33 employees and ended the year with 36 drivers. The average hours worked per driver during the final quarter of 1997 was 44.76 hours per week.

<sup>11</sup> I note that the contract drivers who have been assigned to Overnite by their respective employer's use Overnite's tractor-trailers and are dispatched and supervised on a daily basis by Overnite's supervisors. If the issue ever arose, there is little doubt that Overnite and the respective subcontractors would be considered to be joint employers for this category of employee, notwithstanding their nominal employment by someone other than Overnite. See for example, *W. W. Grainger, Inc. v. NLRB*, 860 F.2d 244 (7th Cir. 1988).

<sup>12</sup> Argo described a long and rather torturous process that he is required to go through to hire a new driver. Much of the difficulty he ascribed to regulatory requirements to see if an applicant is properly licensed and has a clean record. Other difficulties he ascribed to the Company's psychological and other testing procedures which result in an inordinate delay from the time a person files an application to the time that a person can be put on the payroll. In listening to this description of the hiring process, I couldn't help feeling somewhat skeptical in that I wondered how a company could impose procedures which effectively would inhibit its terminal managers from hiring necessary personnel in sufficient time to meet its business needs. I wonder if the procedure described by Argo is followed at terminals where there is no union representation?

The General Counsel contended that the use of subcontractors resulted in the regular drivers having reduced opportunities to work overtime. But this contention is really not supported by the evidence and, as shown above, the fact is that the regular drivers, on average, worked more hours per week after the subcontracting than they worked before.<sup>13</sup>

#### E. Discussion of Unilateral Changes

Once a union becomes the exclusive collective-bargaining representative, an employer is no longer free to act unilaterally insofar as changes which affect his employees' wages, hours, and terms and conditions of employment. The restraint on the employer's freedom of action is required by its obligation to bargain with a union representing his employees. It is not so much the particular unilateral action's effect on the employees, but the action's affect on the bargaining process that is the cause for the prohibition. As stated by the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1961):

[T]he Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiations, and must of necessity obstruct bargaining. . . . It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice. . . . without also finding the employer guilty of overall subjective bad faith. While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here.

Interestingly, and as more fully discussed below, a change may be either too small or too big to require bargaining with a union. Nevertheless, the law as enunciated by the Board and the courts is that in most cases where changes are made which affect existing conditions of employment in circumstances where the employees are represented by a labor organization, the employer must first notify the Union and give it an adequate opportunity to bargain about the change.<sup>14</sup> It goes without saying that in order to prevail, the General Counsel must show that there was, in fact, a change. For if the employer merely has continued an existing practice, it cannot be said that it has made a unilateral change which requires bargaining.

<sup>13</sup> The leased drivers typically handled the appointment freight. The General Counsel seems to suggest that the regular drivers might have been assigned to do the appointment freight either before or after their normal city routes. But as there are only a limited number of hours that customers are open each day to receive freight, there is a practical limit on the number of hours per day that any driver and truck can be out making deliveries or pickups. That limit is defined by the normal business hours of the customers and it would make no sense to send out drivers to make deliveries to locations which are not open.

<sup>14</sup> In *NLRB v. Eltec Corp.*, 870 F.2d 1112 (6th Cir. 1989), the court rejected a company's contention that it had notified and given a union ample opportunity to bargain inasmuch as the announcement of the change was given as an ultimatum and required the Union to respond within 5 days. In that case, the court also found that the employer's offer to bargain after the decision to subcontract was implemented was not sufficient to satisfy its obligation to bargain.

As it is my opinion, that the subcontracting issue is the more significant one, I will address that issue first.

In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the employer, for legitimate economic reasons, but without offering to bargain with the union, displaced its existing maintenance employees by subcontracting out their work to a third party. In concluding that the employer was required to bargain about the decision, the Court stated inter alia:

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The issue of subcontracting and bargaining was obliquely revisited by the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In that case, which involved the employer's partial closing of its business, the Court held that certain types of managerial decisions could be made without bargaining about the decision, if the decision involved a change in the scope and direction of the enterprise, even if it had a direct affect on employment. The Court attempted to define a test which balanced an "employer's need for unencumbered decision making with the benefit of collective bargaining for labor management relations." At footnote 22, the Court noted, "[W]e of course intimate no view as to other types of management decisions such as plant relocations, sales, other kinds of subcontracting, automation etc., which are to be considered on the particular facts." The Board in *Dubuque Packing Co.*, 303 NLRB 386 (1991), set forth the criteria it would use to apply the Court's *First National Maintenance* decision. (*Dubuque* involved an employer's decision to relocate.)

In *Torrington Industries*, 307 NLRB 809 (1992), the employer subcontracted work which resulted in the layoff of two bargaining unit employees who were replaced by independent contractors. The Board concluded that subcontracting decisions similar to those in *Fibreboard* were mandatory subjects of bargaining and did not require the burden shift test utilized in *Dubuque Packing Co.*, supra, even if the decision was not motivated by labor costs. That is, the Board concluded that based on the Supreme Court's decision in *First National Maintenance*, supra, the Court had already struck the balance in favor of finding that decisions to subcontract required bargaining. Nevertheless, the Board did qualify its decision and stated:

We agree that there may be cases in which the nonlabor cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining. We do not reach that issue here, however, because the Respondent's reasons had nothing to do with a change in the "scope and direction" of its business. Those reasons, thus were not matters of core entrepreneurial concern and outside the scope of bargaining.

Subsequent to its decision in *Torrington*, supra, the Board has continued to take the view that employers are required to bargain about a decision to subcontract irrespective of whether

the decisions were motivated by labor cost factors.<sup>15</sup> This approach, however, has had mixed results in the courts of appeals.

In *Geiger Ready Mix Co. of Kansas City*, 315 NLRB 1021 (1994), enf.d. 87 F.3d 1363 (D.C. Cir. 1996), the employer's subcontracting decision resulted in the layoff of unit employees. The Board stated inter alia:

Because this case concerns the reassignment of unit work rather than a plant relocation, *Torrington Industries*, supra, . . . is controlling. The Board in *Torrington Industries* found that in cases factually similar to *Fibreboard Corp. v. NLRB*, when virtually the only circumstance the employer has changed is the identity of the employees doing the work, there is no need to apply the multilayered test of *Dubuque* to determine whether the decision is subject to the statutory duty to bargaining because *Fibreboard*, supra, has already held that such decisions are mandatory subjects of bargaining. As in *Fibreboard*, the Respondents' assignment of nonunit employees to deliver concrete batched at speaker road involved the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer for lower wages.

In *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994), the Board held that the employer violated Section 8(a)(5) by not offering to bargain about its decision to subcontract. It stated:

Contrary to the Respondent's contention, the reasoning of *Torrington Industries*, . . . is not limited to situations in which employees are laid off or replaced. *Torrington* simply recognizes the principle, applicable in this case, that an employer's decision to subcontract is a mandatory subject of bargaining when what is involved is the substitution of one group of workers for another to perform the same work and not a change in the scope and direction of the enterprise. There is no evidence that the decision to subcontract constituted a change in the scope and direction of Respondent's business. Indeed, the plant manager admitted that the subcontracting permitted the Respondent to perform work of the same type done by unit employees in the past while avoiding paying overtime to those employees.

Member Cohen does not read *Torrington* as broadly his colleagues. In his view, subcontracting is a mandatory subject where one group of employees is substituted for another and the decision is based on matters that are amenable to collective bargaining. In the instant case, the evidence indicates that the Respondent subcontracted because it was less expensive to do so than to perform the work in-house on an overtime basis. There is insufficient evidence to establish the Respondent's claim that the subcontracting was necessitated by a customer's special needs which could not be met by use of the Respondent's single machine.

In some of the cases that have been appealed, the courts have concluded that the determination of whether subcontracting decisions must be negotiated should depend on whether labor costs was a factor in making the decision. Thus, in *Furniture*

<sup>15</sup> There are cases holding that subcontracting decision which are motivated by anti-union considerations are illegal under Sec. 8(a)(1), (3), and (5) of the Act. See *Gold Coast Produce*, 319 NLRB 202 fn. 1 (1995); *Girardi Distributors*, 307 NLRB 1497, 1516 (1992); and *Delta Carbonate*, 307 NLRB 118, 121 (1992). As there is no evidence of antiunion motivation in the present employer's decision to subcontract, these cases are not relevant to the issue in the present case.

*Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1246-1250 (3d Cir. 1994), the court rejected what it believed to be the Board's inflexible approach set forth in *Torrington Industries*, supra, and finding that a decision to subcontract was not motivated by labor cost considerations, held that the employer was not obligated to bargain about the decision that was actually motivated by the fact that the employees had been engaged in a pattern of theft and misconduct. In *NLRB v. Eltec Corp.*, 870 F.2d 1112 (6th Cir. 1989), the court, although upholding the Board's finding that the employer had failed to bargain about its decision to subcontract, found that there was ample proof to show that the decision, which was made after the union refused to make concessions, was motivated by labor costs; that it did not alter the company's basic operations; did not involve a substantial capital investment; and would not impose a bargaining requirement that would "significantly abridge" the employer's "freedom to manage the business." Similarly, in *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir. 1991), the court while agreeing with the Board's conclusion regarding the employer's decision to subcontract and relocate, found that the decision was made to lower labor costs and was a decision which was amenable to bargaining within the meaning of *First National Maintenance v. NLRB*, supra. See also *W. W. Grainger, Inc. v. NLRB*, 860 F.2d 244 (7th Cir. 1988).

In *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), the employer subcontracted out unit work and the Board concluded that the employer was obligated to bargain pursuant to the rationale of *Torrington*. Nevertheless, the Board, with member Cohen dissenting, went to considerable length to explain that the Respondent's decision was motivated by labor costs and that the decision to subcontract had an adverse impact on the employees' overtime opportunities. On Appeal, the Third Circuit, refused to enforce the Board's orders vis-a-vis the subcontracting issue. It concluded that the subcontracting decision did not involve the substitution of one group of employees for another and therefore was distinguishable from *Fibreboard*. The Court concluded that the decision to subcontract, which was based on the employer's need to meet increased demand, was not motivated by a desire to eliminate or reduce the overtime of bargaining unit employees and that there was no violation of the Act because the subcontracting had no adverse impact on the bargaining unit. *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (3d Cir. 1998).

In my opinion, the decision to subcontract in the present case amounted to a change in the existing terms and conditions of employment as they existed as of July 1997. Notwithstanding the fact that the Company, in the past, has used subcontracting to obtain drivers to haul excess freight in peak periods, the decision here was made after a hiatus of more than 1-1/2 years.

It is also my opinion that the subcontracting in the present case has not had a direct adverse impact, in any measurable way, on the existing complement of bargaining unit employees. The evidence shows that no drivers were laid off as a result of the subcontracting and no drivers suffered a diminution of income.

On the other hand, one can easily surmise that were a company allowed, without any restraint, to freely substitute subcontractors for regular employees as the latter group leave, it would be possible for an employer, over time, to reduce or even eliminate an existing bargaining unit. Moreover, the substitution of subcontractors' employees, even if occurring as a consequence of the normal attrition of regular employees, would create a real

if indirect impact on the unit employees as it would tend to dilute their bargaining strength and also create a pool of people who would likely be available as strike breakers.

It is my opinion that the use of subcontractors to perform the same work as bargaining unit employees, even if it does not have a direct and immediate impact on those employees could, over time, have a continuing and increasing indirect impact of the bargaining unit and the Union's ability to bargain on their behalf.

The record shows that the use of subcontractors to do bargaining unit work has not resulted in any change in the scope and direction of the Respondent's business and as such, the question as to whether labor costs were a motivating factor in reaching the decision is not controlling under the Board's view of the law. Nor do the facts in this case show that the Company would have faced a crisis in its operations if it had bargained before making up its mind about the subcontracting decision.

I should emphasize that absent discriminatory intent or a contractual prohibition, nothing in the law prevents an employer from making a decision to subcontract unit work and implementing that decision. What the law requires is that an employer first offer to bargain about such a decision. While talk may or may not be cheap, an employer is required, to negotiate with an open mind and give a union a real opportunity to change its mind. Nor is an employer required to negotiate for an indefinite period of time over such a decision. The employer is required to bargain until either an agreement or an impasse is reached. Where circumstances require quicker action, the employer may demand, for example, that the union meet soon and often in order to resolve the matter expeditiously. While it not possible to define with absolute certainty, the extent of required bargaining, a union may not hold a decision hostage by either refusing to meet or by seeking to delay bargaining.

For the reasons described above, it is my opinion that under Board law, which I am bound to follow, *Torrington Industries* is controlling and that the Respondent has violated Section 8(a)(1) and (5) by failing to notify the Union and failing to offer to bargain about its decision to subcontract out bargaining unit work.

The facts in this case show that the Employer also unilaterally changed, without bargaining, the starting times of some of the dockworkers in May 1996 and unilaterally instituted a call-in system for both dockworkers and drivers in January 1997. Both of these changes were of short duration and affected, in either case, a relatively small proportion of the bargaining unit employees.

Changes in starting time and changes in call-in systems each involve mandatory subjects of bargaining as they relate to employee hours and terms and conditions of employment. *Carbonex Coal Co.*, 262 NLRB 1306, 1313 (1982) (change in shift schedule affecting 3 employees); *Mitchellace Inc.*, 321 NLRB 191, 195 (1996) (change in hours held to be nontrivial change in shift starting times); *Blue Circle Cement Co.*, 319 NLRB 954 (1995) (change in start times); *Carpenters Local 1031*, 321 NLRB 30 (1996) (change requiring employee to work one half hour more per day); and *United Parcel Service*, 323 NLRB 593 (1997) (modification of existing on call system).

The Employer contends that both changes were consistent with its past practice and therefore did not amount to changes at all, citing cases such as *KDEN Broadcasting Co.*, 225 NLRB 25, 34-35 (1976) (employer had a past practice of changing

schedules); *Mitchellace, Inc.*, supra (employer changed work schedules in manner consistent with past practice); and *Matheson Fast Freight*, 297 NLRB 63 (1989) (change in starting times consistent with past practice). As stated in *KDEN Broadcasting Co.*, supra:

The Board has clearly indicated that schedule and hour changes that are consistent with an employer's past practice are not violative of the Act. The rule is well reasoned because if an employer were prevented from operating in its normal routine fashion once a union is certified, it could bring the business to a grinding halt. A basic purpose of the Act is to encourage and promote industrial peace and it was never intended to bring about a cessation of production.

In the case of the requirement that employees call in before reporting to work during the slow season, the evidence does not show that the Employer had ever required this of its employees before and this therefore was a change.

In the case of the change in the dockworker's starting time, the evidence shows that in the past, the Employer did shift individual employees on an ad hoc basis to either earlier or later start times, depending largely on the volume of expected freight. However, in the present case, the change in having four of the dockworkers start at 1 a.m. rather than their normal 11 p.m. start time, was instituted for the group to deal with a new policy whereby the Company guaranteed same day delivery of any freight received in the terminal by 10 a.m. Thus, the change was related to a freight delivery decision that was within the discretion of the Company and not the result of outside forces not within its control. And as the change in start times in this instance was not related to freight volume, the change was something new and therefore subject to negotiations. *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992) (unilateral change in work schedules held to violate Section 8(a)(5)).

The Respondent also argues that the changes involved herein were not sufficiently substantial as to require bargaining. And under Board law, a unilateral change, even if affecting employee terms of employment, may be so insubstantial as to excuse any obligation to bargain. *Civil Service Employees Assn.*, 311 NLRB 6 (1993) (Board held that requirement that employees carry and use beepers was not a material change from prior practice of requiring field employees to call into office several times a day). See also *Alamo Cement Co.*, 281 NLRB 737 (1988), and *Trading Port, Inc.*, 224 NLRB 980 (1976).

Despite this contention, the Board has held in several of the cases cited above that changes in work schedules and start times constitute changes in conditions of employment, substantial enough to require bargaining. Also, a procedure requiring employees to call in before reporting to work, in order to see if there is enough work, is in my opinion, a significant enough change in work conditions so as to warrant bargaining even if its affect on employees' earnings was slight or even hypothetical.

Finally, even if either of these changes, by themselves, could be considered to be insubstantial, they did not occur in isolation. *Equitable Resources Energy Co.*, 307 NLRB 730, 733 (1992).

## CONCLUSIONS OF LAW

1. By unilaterally subcontracting bargaining unit work, the Respondent has violated Section 8(a)(1) and (5) of the Act.
2. By unilaterally changing starting times of dockworkers, the Respondent has violated Section 8(a)(1) and (5) of the Act.
3. By unilateral requiring employees to call in before reporting to work, the Respondent has violated Section 8(a)(1) and (5) of the Act.
4. By refusing to furnish to the Union a copy of the Home Depot complaint letter in relation to the discipline of Carlos Ramirez, the Respondent has violated Section 8(a)(1) and (5) of the Act.
5. The Respondent has not violated the Act in any other manner alleged in the consolidated complaint.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## REMEDY

As the evidence in this case does not show that the unilateral changes have had any material or measurable affect on the earnings of the bargaining unit employees, I conclude that no backpay remedy is required. Nevertheless, as these changes affect and tend to undermine the process of good-faith bargaining, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]